Filed 8/30/19 In re N.R. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re N.R., a Person Coming Under the Juvenile Court Law.	H046760 (Santa Clara County Super. Ct. No. JD025194)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	

Appellant J.S. (the mother) appeals from the juvenile court's order terminating her parental rights to her daughter N.R. and selecting adoption as N.R.'s permanent plan. She contends that the juvenile court should have found that the parental relationship exception precluded termination of her parental rights. The mother also contends that the juvenile court erred in finding that the Santa Clara County Department of Family and Children's Services (the Department) had complied with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (the ICWA). The Department concedes that it did not comply with the ICWA and that a remand is necessary for it to do so. We accept this concession. We reject the mother's

claim that the juvenile court abused its discretion in finding that the parental relationship exception did not apply.

I. Background

Three-year-old N.R. was taken into protective custody in May 2018 after the mother was arrested for domestic violence. The mother had assaulted a male friend, cut him with a pair of scissors, and kicked him in the face. N.R. was present in the motel room they were sharing at the time. The mother claimed that N.R. was sleeping during the incident and that N.R. woke up after the incident and asked her: "Mommy, you going to jail?" N.R. told the social worker that "'they were fighting,'" and she was "scared." N.R. also reported that she was afraid of the police because they had taken the mother to jail. The mother tested positive for marijuana, methamphetamine, and amphetamine.

The Department filed a petition asking the court to take jurisdiction of N.R. under Welfare and Institutions Code section 300.[1] The petition alleged that the mother had failed to protect N.R. (§ 300, subd. (b)), that N.R. was suffering from serious emotional damage (§ 300, subd. (c)), and that the mother had abused or neglected N.R.'s half siblings (§ 300, subd. (j)). N.R. was detained and placed in foster care. In June 2018, the Department filed amended petitions adding allegations against the father.

The mother told the social worker that she "does not remember much of her childhood" and that she "'grew up in Juvenile Hall,'" where she had spent most of her life from age 13 to age 18. She admitted that she had been using methamphetamine since she was 17 years old (a period of 14 years), and she related that she had been prescribed a variety of medications, "including Depakote, Lithium, Remeron, Trazodone, and Wellbutrin," though she denied any mental health diagnosis. The mother denied any child welfare history, but she admitted that one of her two older children had been

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[1] Subsequent statutory references are to the Welfare and Institutions Code.

adopted and that the maternal grandmother was the guardian of the other older child. The mother said that she was currently homeless and living in her car. The father admitted that he too had a methamphetamine substance abuse problem. Both the mother and the father had significant criminal histories.

In fact, the mother's eldest daughter had been declared a dependent in Humboldt County in 2006 after the mother and the eldest daughter tested positive for amphetamine and marijuana at the time of the eldest daughter's birth. Although the mother was granted reunification services, she did not make progress on her case plan. Reunification services were terminated, her parental rights were terminated, and the child was adopted in 2007. The mother's son, born in 2009, had been removed from her custody as an infant and was in the custody of the maternal grandmother under a guardianship.

The mother had used methamphetamine while she was pregnant with N.R. The maternal grandmother reported that the mother "'gets psychotic when she is on meth'" and "attacks people." The mother had a history of assaulting men with her vehicle. At one point, the mother had crashed her vehicle, in which N.R. was a passenger, into the father's vehicle. An active restraining order protected the father from the mother.

Although the parents both met the requirements for a bypass of reunification services, the Department initially recommended that the parents be granted reunification services because it hoped that they would participate in services. The mother had been visiting N.R. regularly, and the two were "happy to see one another." The mother was observed to be "affectionate and supportive" toward N.R. during visits. However, neither the mother nor the father took advantage of any of the services that the Department offered, and the father did not even visit N.R. The mother rarely participated in drug testing; one of her few drug tests was positive for methamphetamine in July 2018. She made no progress in addressing the substance abuse and domestic violence issues that had led to the dependency proceedings.

At the July 2018 jurisdictional hearing, the court found the petition true. The Department changed its recommendation to bypass for the father. N.R.'s trial counsel recommended that the court bypass reunification services for the mother on the ground that such services were not in N.R.'s best interest. In August 2018, the Department changed its recommendation to bypass for both the mother and the father.

At the August 31, 2018 contested dispositional hearing, the court declared N.R. a dependent, removed her from parental custody, bypassed reunification services for both parents, and set a section 366.26 hearing for December 20, 2018. The court ordered that the mother continue to have twice weekly supervised visits with N.R.

On December 17, 2018, the mother filed a section 388 petition seeking reunification services. At the December 20 hearing, the court denied the mother's section 388 petition because she had failed to make a prima facie case, and it continued the matter for a contested section 366.26 hearing in February 2019. In February 2019, the mother's request for a bonding study was denied, and the section 366.26 hearing was continued to March 2019.

At the March 2019 hearing, the mother's trial counsel argued that the parental relationship exception applied. The Department's evidence established that N.R. had been living with the foster parents since May 2018, and they were committed to adopting her. She called them mom and dad, and she was "very comfortable" with them. The mother had continued to visit N.R. regularly twice a week throughout the dependency proceedings. The visitation supervisor testified that the mother and N.R. were affectionate with each other and that N.R. welcomed the mother's affection. The Department conceded that the mother had "maintained regular visitation and contact with [N.R.]."

The court found that the mother had established that she had "maintained regular visitation and contact" throughout the dependency proceedings. However, the court found that she had failed to meet her burden of showing that her relationship with N.R.

merited a rejection of adoption. While "there clearly is a bond between the mother and [N.R.] . . . it's just really not enough at this point." The court found it significant that the mother had failed to address her substance abuse and consequently had never progressed beyond supervised visitation. The court terminated parental rights and selected adoption as N.R.'s permanent plan. The mother timely filed a notice of appeal from the court's order.

II. Discussion

A. Parental Relationship Exception

The mother contends that the juvenile court erred in finding that the parental relationship exception did not apply here.

"Adoption must be selected as the permanent plan for an adoptable child and parental rights terminated unless the court finds 'a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. . . .' (§ 366.26, subd. (c)(1)(B).) '[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.'" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*).)

"[T]he existence of a beneficial parental or sibling relationship . . . is a factual issue [so] the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination." (*Bailey J., supra,* 189 Cal.App.4th at p. 1314.) "The other component of both the parental relationship exception and the sibling relationship exception is the requirement that the juvenile court find that the existence of that relationship constitutes a '*compelling reason* for determining that termination would be detrimental.' (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a 'compelling reason' for finding detriment to the

child is *based* on the facts but is not primarily a factual issue. It is, instead, a 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court's decision is discretionary, the abuse of discretion standard of review applies." (*Id.* at p. 1315.)

"'The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs.' [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' [Citation.] Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*Bailey J., supra,* 189 Cal.App.4th at pp. 1315-1316.)

Here, the juvenile court found that the mother and N.R. had a beneficial parental relationship but that the mother had failed to show that the detriment to N.R. of the termination of that relationship outweighed the benefit to N.R. of the permanence and stability of adoption. The record supports this determination.

The mother had a long history of neglecting her children. N.R., like her older siblings, had suffered from the mother's unwillingness to fully acknowledge or address her substance abuse and domestic violence issues. N.R. was in the mother's vehicle when the mother crashed her vehicle into the father's vehicle. N.R. was in the motel

room when her mother attacked a man with scissors and kicked him in the face. N.R. feared the police because she had witnessed the police taking the mother to jail. N.R. was taken into protective custody because the mother was under the influence of methamphetamine and could not control her violent tendencies. These were not isolated incidents; they were consistent with the mother's past conduct. The mother took no significant steps during the dependency proceedings to show that she could be a *positive* influence in N.R.'s life. Ten months into the dependency proceedings, she had done nothing to advance beyond supervised visitation. While N.R. enjoyed playing with the mother during these visits, the juvenile court could have reasonably concluded that the benefit to N.R. of a stable, permanent, loving home with foster parents who were committed to adopting her and whom she called mom and dad far outweighed any detriment she might suffer from the loss of her very limited relationship with the mother.

The mother relies on *In re E.T.* (2018) 31 Cal.App.5th 68 (*E.T.*). The dependency proceedings in *E.T.* began when the twins were four months old. The mother, who had a history of mental health and substance abuse issues, participated in reunification services for a year before the children were returned to her custody with family maintenance services. More than a year later, the mother sought assistance from the social worker after she relapsed. They agreed that the mother would temporarily place the children with their godparents while the mother sought treatment. However, a supplemental petition was filed, and the court sustained the petition and bypassed reunification services. The mother continued to visit the children frequently. Although her relapse lasted for several months, she pursued treatment and had repeatedly tested negative for drug use for six months prior to the permanency planning hearing. The mother provided "comfort and affection" to the children and relieved their "fears and anxiety." (*E.T.*, at pp. 71-74.)

The First District Court of Appeal found that the juvenile court had abused its discretion in finding that the parental relationship exception did not apply. The juvenile

court had found that the twins were "'very tied'" to the mother, but it concluded that this bond did not mean "'they can't be happy'" with their godparents. (*E.T.*, *supra*, 31 Cal.App.5th at p. 77.) The First District admonished: "The standard is whether the children benefit from Mother's presence in their lives, not whether they could eventually be happy without her." (*Ibid.*) It concluded that this was "the rare case" where the parental relationship exception applied and precluded adoption. (*Id.* at p. 70.)

The facts of the case before us are not similar to those in *E.T.* Unlike the mother in *E.T.*, the mother here did not voluntarily seek out assistance from the Department or diligently pursue treatment for any of the issues that led to the dependency proceedings. She continued to use methamphetamine throughout the proceedings and did not engage in any treatment for her violent tendencies. The evidence in this case did not establish that N.R. was strongly bonded to the mother or that the mother relieved N.R.'s fears or anxiety.

E.T. is readily distinguishable on its facts. However, the mother relies on the First District's statement in *E.T.* that the "standard is whether the children benefit from Mother's presence in their lives." (*E.T.*, *supra*, 31 Cal.App.5th at p. 77.) She takes this statement out of context. The applicable standard is whether the detriment to the child from the termination of the parental relationship outweighs the benefits that the child will gain from adoption, including a permanent and stable home. (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.) Under this standard, we find no abuse of discretion in the juvenile court's decision in this case that the mother failed to meet her burden of showing that the parental relationship exception applied here and precluded adoption.

B. The ICWA

The mother contends that the juvenile court erred in finding that the Department had complied with the ICWA's inquiry and notice requirements. The Department

concedes that it did not satisfy those requirements and that a remand is necessary for it to do so.

1. Background

The Department asked both the mother and the father at the initiation of the dependency proceedings whether either of them had any Native American ancestry. The mother told the social worker that her maternal grandfather had Native American ancestry, though she did not know the name of his tribe. The father reported that he did not know of any Native American ancestry in his family. The detention report stated that there was "reason to believe" that N.R. "is or may be an Indian child" and therefore notices should be sent.

In May 2018, the mother's maternal grandfather told the Department that his grandmother was "full-blooded Cherokee Indian." On May 31, the Department contacted N.R.'s paternal aunt, who provided contact information for N.R.'s paternal grandmother. On June 4, the social worker spoke with the paternal grandmother, who reported that "she believes that she has Native American Ancestry and is potentially Cherokee Indian." Although the social worker reported that the paternal grandmother "attempted to provide" information, the social worker noted that the "information was unclear." A week later, the social worker had not yet been able to make contact with the paternal grandmother again.

On June 5, 2018, the Department sent ICWA notices to three Cherokee tribes and the Bureau of Indian Affairs. These notices included information about N.R.'s maternal relatives and their tribal affiliation but no information about N.R.'s paternal relatives or their possible tribal affiliation other than her paternal grandmother's name. Ultimately, two of the three tribes responded that "based on the information" provided, N.R. was not eligible for membership. The third Cherokee tribe did not respond. At the July 11, 2018 jurisdictional hearing, the court found that the ICWA did not apply.

On August 2, 2018, the social worker interviewed the paternal grandmother again. The social worker also interviewed the paternal grandmother on August 24. There is no indication in the record that the social worker made any further inquiry of the paternal grandmother regarding her Native American ancestry. At the August 2018 dispositional hearing, the court found that ICWA notices had been given as required and that the ICWA did not apply.

At the March 2019 section 366.26 hearing, the father told the court that he had no additional information to report regarding Native American ancestry in his family. The court found that proper notices had been sent and that the ICWA did not apply.

2. Analysis

"The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child . . . if the child is at risk of entering foster care or is in foster care." (Former, § 224.3, subd. (a).) "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe . . . ." (Former, § 224.3, subd. (b).)

"When the dependency court has reason to believe a child is an Indian child within the meaning of the Act, notice on a prescribed form must be given to the proper tribe or to the Bureau of Indian Affairs, and the notice must be sent by registered mail, return receipt requested." (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) "The notice requirement applies even if the Indian status of the child is uncertain. [Citation.] The showing required to trigger the statutory notice provisions is minimal; it is less than the showing needed to establish a child is an Indian child within the meaning of ICWA.

[Citation.] A hint may suffice for this minimal showing." (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.) "One of the purposes of giving notice to the tribe is to enable it to determine whether the minor is an Indian child. [Citation.] Notice is meaningless if no information or insufficient information is presented to the tribe to make that determination. . . . The burden is on the Agency to obtain all possible information about the minor's potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA. [Citation.]" (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630.)

In this case, it is readily apparent that the Department did not fulfill its continuing duty to inquire further of the paternal grandmother about her Native American ancestry after she had identified a possible tribal affiliation. It is also clear that the Department did not fulfill its duty to provide adequate information about paternal relatives in the notices that it sent to the Cherokee tribes. It provided no information about paternal relatives (other than the paternal grandmother's name) and did not even mention her possible tribal affiliation. Where the notice fails to include information on the person who is alleged to be the source of Indian heritage, the notice is inadequate because "the tribes could not conduct a meaningful search with the information provided." (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116-1117.)

Accordingly, we agree with the mother and the Department that a remand is required for the Department to comply with its inquiry and notice obligations.

III. Disposition

The juvenile court's order is reversed. On remand, the court shall require the Department to fully comply with its inquiry and notice obligations under the ICWA. If any tribes identify N.R. as an Indian child, the court shall proceed in accordance with the ICWA. If no tribe identifies N.R. as an Indian child, the court shall reinstate its order.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.

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